LIBRARY

Office Supreme Court, U.S.
FILED
OCT 8 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. 525

MORTON SALT COMPANY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

LLOYD M. MCBRIDE,
ROBERT B. GERRIE,
Counsel for Petitioner,
110 North Wacker Drive,
Chicago, Illinois 60606

TWENTIETH CENTURY PRESS, INC., CHICAGO 6

INDEX

	Page
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTES AND REGULATIONS INVOLVED	4
STATEMENT	4
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	15
APPENDIX A—Statutes and regulations	17
B—Opinion, including findings of fact and conclusion of law, and judgment below	45
C—Conflicting Opinions	93

CITATIONS

Cases:

Alabama By-Products Corporation v. *Patterson*, 258 F. 2d 892 (CA-5, 1958) 10, 11, 12, 113

Henderson Clay Products v. *United States*, 199 F. Supp. 304 (E.D. Tex. 1961) 10, 12, 131

New Idria Quicksilver Mining Co. v. *Commissioner*, 144 F. 2d 918 (CA-9, 1944) 14, 15, 185

Riddell v. *Monolith Portland Cement Co.*, 371 U.S. 537, 83 S. Ct. 379 (1963) 10, 13, 14, 16, 109

Scott v. *United States*, 60-2 U. S. Tax Cas. ¶ 9731 (N.D. Ala. 1960) 10, 12, 151

Townsend v. *Hitchcock Corporation*, 232 F. 2d 444 (CA-4, 1956) 14, 15, 179

United Salt Corporation v. *Commissioner*, 40 T. C. (No. 42) May 17, 1963 ..... 9, 10, 12, 155

United States v. *Cannelton Sewer Pipe Company*, 364 U. S. 76, 80 S. Ct. 1581 (1960) 8, 9, 10, 11, 12, 13, 14, 15, 16, 93

Page

United States v. *Gilbert Associates*, 345 U. S. 361, 73 S. Ct. 701 (1953) 8

United States v. *Merry Brothers Brick & Tile Co.*, 242 F. 2d 708 (CA-5, 1957), cert denied 355 U. S. 824 8

Statutes and Regulations:
Internal Revenue Code of 1939:

Section 23(m), ch. 1, § 23(m), 53 Stat. 14 ..... 4, 17

Section 114(b)(4), ch. 1, § 114(b)(4), 53 Stat. 45, as amended 4, 17

Internal Revenue Code of 1954:
Section 613, ch. 736, § 613, 68A, Stat. 208 ..... 4, 19

Proposed Treasury Regulations § 1.613-3(b), (c), (d), 21 Fed. Reg. 8439 (1956) 3, 4, 32

Treasury Regulations 111, Section 29.23(m)-1 (1943), as amended 3, 4, 23

Treasury Regulations 118, Section 39.23(m)-1 (1953), as amended 3, 4, 31

Miscellaneous:

Rev. Rul. 55-350, 1955-1 Cum. Bull. 290 14

T. D. 6446, 1960-1 Cum. Bull. 208 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO.

MORTON SALT COMPANY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner, Morton Salt Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered on May 10, 1963.

OPINION BELOW

The opinion of the United States Court of Claims (App. B, *infra*, pp. 45-56) is reported at 316 F.2d 931. Its findings of fact and conclusion of law printed by the Court with its decision (App. B, *infra*, pp. 56-91) are not officially reported.

JURISDICTION

The judgment of the United States Court of Claims was made and entered on May 10, 1963 (See App. B, *infra*, pp. 55-56) dismissing Morton Salt Company's petition as to Counts I and III (relating to the percentage depletion al-

lowance) and holding, pursuant to a stipulation of the parties, that Morton Salt Company was entitled to recover on Counts II and IV of its petition (involving issues not related to the percentage depletion allowance). A timely motion for a rehearing and to alter or amend judgment was filed by Morton Salt Company and an order denying said motion was entered on July 12, 1963. On August 16, 1963, a judgment of the United States Court of Claims was made and entered in favor of Morton Salt Company in a specified sum, together with interest as provided by law, relative to Counts II and IV of its petition. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1255(1).

QUESTIONS PRESENTED

Petitioner, an ordinary miner of salt (sodium chloride), mines salt from solid deposits in the earth and, utilizing the dry mining method to produce rock salt and the hydraulic mining method to produce evaporated salt from the same or different deposits, sells screen grades of salt in bulk, packaged and compressed forms. Standardization is widespread in the salt industry and, within the three basic categories of salt, i.e., rock salt, evaporated granulated salt, and evaporated flake or grainer salt, all members of the salt industry, including the petitioner, employ the same processes to produce the salt sold. With respect to both rock salt and evaporated salt, there are no substantial sales either by the industry in general or by the petitioner in particular prior to the sale of dried and screened salt in bulk form.

Under the Internal Revenue Code,[1] miners of designated

[1] Petitioner's suit for refund covers the years 1951, 1952, 1953 and 1954. Its suit for the first three years is predicated upon the provisions of the Internal Revenue Code of 1939 and for the last year upon similar provisions of the Internal Revenue Code of 1954.

minerals are entitled to a depletion allowance determined by applying a specified percentage[2] to the taxpayer's gross income from "mining". "Mining" is defined as including "the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products***."

The questions presented are:

1. Whether, the court below having held the commercially marketable product for ordinary miners of salt to be after the screening process at which point there are sales of substantial bulk tonnages by the petitioner and by the salt industry, petitioner may include in its gross income from "mining" the proceeds received from salt sold in bulk form after screening plus the amount that would have been received if the salt processed beyond screening (packaging, compression or introduction of additives) were deemed to have been sold in bulk form after "allowable" processing as contemplated by the applicable Treasury Regulations,[3] or whether, as held below, a "proportionate profits" formula must be applied with respect to all sales of salt by petitioner.

2. Whether the petitioner is entitled to include in its gross income from "mining" (a) proceeds from the sale of such of its salt as is packaged because of legal requirements for sales for human and animal consumption or because after the "allowable" process of screening it cannot be commercially marketed in bulk form and (b) proceeds

[2] The percentage specified for sodium chloride is 5% for the years 1951, 1952, and 1953 and 10% for 1954.

[3] Treasury Regulations 118, section 39.23(m)-1(e); Treasury Regulations 111, section 29.23(m)-1(f); also see Treasury Regulations § 1.613-3(b), (c), (d) proposed November 3, 1956 but not yet adopted.

from the sale of such of its salt as contains an additive for such purposes as preventing caking or freezing.

3. Whether the petitioner is entitled to make an adjustment in the computation of its net income for the purposes of the "net income limitation"[4] comparable to the adjustments to be made in determining its "gross income from mining".

STATUTES AND REGULATIONS INVOLVED

The pertinent statutory provisions are Sections 23(m) and 114(b)(4) of the Internal Revenue Code of 1939 and Section 613 of the Internal Revenue Code of 1954. The pertinent regulations are Section 29.23(m)-1 of Treasury Regulations 111 and Section 39.23(m)-1 of Treasury Regulations 118. On November 3, 1956, notice of proposed rule making with respect to regulations for taxable years beginning after December 31, 1953, under Section 613, among others, of the Internal Revenue Code of 1954, was published in the Federal Register (21 Fed. Reg. 8439). Although a number of these proposed regulations were adopted, paragraphs (b), (c) and (d) of §1.613-3, relating to gross income from mining, were not adopted but were continued as proposed regulations (T.D. 6446, 1960-1 Cum. Bull. 208). The foregoing statutory provisions, regulations and proposed regulations are printed in Appendix A, *infra*, pp. 17-44.

STATEMENT

Petitioner, a corporation having its principal place of business in Chicago, Illinois, was engaged in the business of extracting, processing and selling salt in its various forms and grades during the taxable years 1951, 1952, 1953

[4] Sec. 114(b)(4)(A) of the Internal Revenue Code of 1939; Sec. 613(a) of the Internal Revenue Code of 1954.

and 1954. (App. B, *infra*, p. 45). It had a salt plant or plants in each of the producing areas in the United States which are generally known as the New York, Ohio, Kansas, Texas, Louisiana and Michigan producing areas (App. B, *infra*, p. 57). It extracted salt from solid deposits in the earth by both dry mining and hydraulic mining (App. B, *infra*, p. 57) at its plants in Weeks, Louisiana and Grand Saline, Texas, and by hydraulic mining only at its plants in Silver Springs, New York, Port Huron, Michigan, Manistee, Michigan, Rittman, Ohio, and Hutchinson, Kansas. (App. B, *infra*, p. 57)

Rock salt is produced by dry mining, utilizing processes essentially the same as those employed in mining coal. (App. B, *infra*, p. 59) Evaporated salt is produced by hydraulic mining (brine wells) where water is pumped into the salt deposit, the resulting solution is pumped to the surface, and heat is applied to evaporate the water. (App. B *infra*, p. 58). The choice of method of extraction depends upon the quality of the sodium chloride deposits, the depth of the deposits, and the requirements of the proximate market for salt. (App. B, *infra*, pp. 57-58) The salt industry is highly standardized. (App. B; *infra*, p. 48) There were 11 principal members in the salt industry and they, and all other salt producers, have historically used the same processes to produce rock salt, evaporated granulated salt and evaporated flake salt, respectively. (App. B, *infra*, pp. 48, 82)

There is no appreciable market for salt until it has been screened at which point substantial tonnages are sold in bulk form and the balance is packaged for sale. Using 1954 as an example (as did the court below), the United States Bureau of Mines Minerals Yearbook (App. B, *infra*, p. 80) indicated that 4,824,708 tons of rock salt and 3,731,087 tons of evaporated salt were sold or used by producers in the United States (including Puerto Rico). In that year,

petitioner sold 499,691 tons of rock salt and 1,000,159 tons of evaporated salt of which 56.36% of its rock salt tonnage and 26.93% of its evaporated salt tonnage was sold in bulk form and the respective balances in packaged or compressed form. (App. B, *infra*, p. 73) Other producers also sold substantial tonnages of rock salt and evaporated salt in bulk form after screening. (App. B, *infra*, p. 76) A portion of the packaged salt sold by salt producers was packaged because of legal requirements for sales of salt for human or animal consumption or because after the "allowable" process of screening certain of the screened grades cannot be handled physically in bulk form. (App. B, *infra*, pp. 67-68). In addition to the quantities of salt without additives sold by salt producers, a certain portion of the salt contained additives solely for the purpose of preventing caking or freezing or otherwise protecting the "free flowing" qualities of the salt. (App. B, *infra*, p. 65)

The court below concluded that the proper cutoff point for salt produced by dry mining (rock salt) was sales in bulk after screening and drying because that was the first point of industry sales of substantial tonnages of rock salt. (App. B, *infra*, pp. 54-55) That court also concluded that salt produced by hydraulic mining (evaporated salt) was commercially marketable within the meaning of the statute after screening because there were industry sales of substantial tonnages of evaporated salt in bulk after screening. (App. B, *infra*, pp. 54-55) However, the court below also concluded that it was procedurally barred from considering whether the cutoff point for evaporated salt should be prior to bulk sales of screen grades and implied that, absent this procedural barrier, it might have been persuaded to place the cutoff point at the brine well because chemical companies, on a "captive" basis, extract salt by hydraulic mining in large quantities to make chlorine,

caustic soda and other chemical products. (App. B, *infra*, pp. 54-55, 80, 84)

Compared with the approximately 8½ million tons of rock salt and evaporated salt sold in 1954, one small salt producer transported by pipeline and sold something less than 112,225 tons of salt in brine form (App. B, *infra*, p. 78), and an oil company sold 6,731 tons of salt in brine form (App. B, *infra*, p. 79), constituting a total which, if comparable at all, is about 1½ percent of the rock salt and evaporated salt sold. Both companies sold their salt in brine form within a small radius of Houston, Texas. (App. B, *infra*, pp. 78-79)

Having concluded that the cutoff point for the salt industry was bulk sales of screened and dried rock and evaporated salt, the court below then held that the Commissioner of Internal Revenue was correct in applying the "proportionate profits" formula (App. B, *infra*, pp. 55, 87-89) to determine petitioner's depletion base despite the court's acknowledgement of the facts that petitioner does not utilize its salt in the production of any other product that is chemically or physically different (App. B, *infra*, p. 54) and that petitioner actually sells substantial tonnages of its salt at the cutoff point determined by the court, i.e., screened and dried rock and evaporated salt in bulk. (App. B, *infra*, pp. 73-75)

By means of a stipulation filed with the court below, the parties agreed that the trial was to be limited to the issues of fact and law relating to the right of the petitioner to recover, reserving the determination of the amount of recovery, if any, for further proceedings, as permitted by rule of the court below.

The jurisdiction of the Court of Claims was invoked under 28 U.S.C., Section 1491(2) because there was involved a claim against the United States founded upon an Act of Congress.

REASONS FOR GRANTING THE WRIT

1. The questions presented are ones which affect to a very substantial degree the tax liabilities and the competitive situation of the members of the salt industry and of a substantial number of other miners who sell a depletable mineral without physical or chemical change, but who may apply "unallowable" processes to a portion of their production. Petitioner believes that this case is to the ordinary miner what the *Cannelton* case[5] was to the integrated miners of a depletable mineral who use that mineral to produce other products. As pointed out by the Government in the *Cannelton* case, Congress was seeking "a simple, practical rule" in establishing percentage depletion[6] and "the tax laws should be construed, where possible, to avoid, rather than create or promote discrimination."[7] The decision of the court below would require the application of an arbitrary formula, i.e., the "proportionate profits" formula, to all sales by an ordinary miner to determine his *gross income from mining* if he applies "unallowable" processes to a portion of his production even though all of his sales are of the basic depletable mineral.

Thus, in the salt industry, despite the fact that competitive pressures in each marketing area maintain a situation where the gross income per ton of each salt producer in the area over a given period is substantially the same, the "proportionate profits" formula approved by the court below would produce a different gross income

[5] *United States* v. *Cannelton Sewer Pipe Company*, 364 U.S. 76, 80 S. Ct. 1581 (1960).

[6] Government's petition in the *Cannelton* case, *supra*, citing *United States* v. *Merry Brothers Brick & Tile Co.*, 242 F. 2d. 708, 711-712 (CA-5, 1957), certiorari denied 355 U.S. 824 (Pet. p. 11).

[7] Government's petition in the *Cannelton* case, *supra*, citing *United States* v. *Gilbert Associates*, 345 U.S. 361, 364, 73 S. Ct. 701 (1953) (Pet. p. 18).

per ton from one salt producer to another dependent upon the vagaries of a cost formula. Rather than promoting uniformity of tax treatment, the inevitable result would be discrimination (and consequent competitive disadvantage to some) among ordinary miners in a completely standardized industry. Administratively, the determination of the "gross income from mining" of each salt producer based upon the amount for which he sells the ordinary product of his mine after deducting returns, allowances, freight and warehousing ("net sales") is a relatively simple matter and provides the uniformity of treatment contemplated by the Congress and supported by the Government in the *Cannelton* case.[8] Conversely, the determination of gross income from mining by the application of an arbitrary cost formula would perpetuate the wide variations in the treatment of the various salt producers which has been accorded the members of the industry to date by the various district offices of the Internal Revenue Service.

An immediate example of discriminary treatment is presented by the decision of the court below as contrasted with the decision of the Tax Court of the United States in *United Salt Corporation* v. *Commissioner*, 40 T.C. No. 42, May 17, 1963 (App. C, *infra*, pp. 155-178), decided a week after the instant case. In the *United Salt* case, the court held that the taxpayer's rock salt "mining" activity for depletion allowance purposes ended immediately after the screening process, the same conclusion as reached by the court below. However, the Tax Court then held that the taxpayer's depletion base (gross income from mining) is the gross income it would have received if it had sold all its rock salt as bulk salt, determined by computing the

[8] See note 5, *supra*.

average net sales price per ton of all bulk salt sold by the taxpayer in the applicable year and multiplying *the total tonnage of all salt sold by the taxpayer* in that year by the *bulk price per ton* so computed.[9] This was the method of determining the gross income from mining for rock salt which was urged *by the Government* in the *United Salt* case. Although the *United Salt* case was presented to the court below by petitioner in its motion for rehearing, the Government made no attempt to eliminate this discriminatory result. Instead, in its brief in opposition to petitioner's motion for rehearing, the Government supported the decision of the court below.

2. The decision of the court below is directly in conflict with the decision of the United States Court of Appeals for the 5th Circuit in *Alabama By-Products Corporation* v. *Patterson*, 258 F. 2d 892, (CA-5; 1958) (App. C, *infra*, pp. 113-128) and with the subsequent decisions of two United States District Courts in that Circuit,[10] all of which cases review the pertinent Treasury Regulations setting forth the basis for the application of the "proportionate profits" formula,[11] as well as being in conflict, in principle with the decisions of this court in the *Cannelton* and *Monolith* cases, *infra*, and with the decision of the Tax Court in the *United Salt* case, *supra*. As is evident from the language of the Treasury Regulations, from the court decisions referred to above interpreting those Regulations, and from

---

[9] The need for resulting adjustments in the computation of the taxpayer's net income for the purposes of the 50% of net income limitation was recognized by the parties and the Court in the *United Salt* case.

[10] *Scott* v. *United States*, 60-2 U.S. Tax Cas. ¶ 9731 (N.D. Ala. 1960); *Henderson Clay Products* v. *United States*, 199 F. Supp. 304 (E.D. Tex. 1961); Printed in App. C, *infra*, pp. 151-153 and pp. 131-149, respectively.

[11] See note 3, *supra*, and the "proportionate profits" formula printed in App. A, *infra*, pp. 26-27.

the interpretation of the Treasury Regulations by the Government as set forth in its petition in the *Cannelton* case,[12] the "proportionate profits" formula is not applicable if either of the following two situations exist:

(a) If the taxpayer produces and sells the product of his mine having applied to it only the ordinary treatment processes contemplated by the statute.[13] (The court below found this product to be screened and dried salt sold in bulk form. Petitioner sold substantial quantities of screened and dried salt, both rock and evaporated, in bulk form.)

(b) If the taxpayer does not sell the product of his mine having applied only the ordinary treatment processes contemplated by the statute but instead further processes his product, then if there is a representative market or field price of a mineral product of like kind and grade as beneficiated by the ordinary treatment processes actually applied. (Other members of the salt industry produce and sell substantial quantities of

---

[12] Note 21 on page 15 of the Government's petition in the *Cannelton* case, *supra*, reads, in part, as follows: "There is ordinarily no difficulty in designating the basic (least processed) marketable product derived from a particular mineral. The subject, in any event, lends itself readily to expert determination and to statement in appropriate regulations. It would, of course, remain necessary, in the event that a particular miner-manufacturer did not sell the mineral product in its least processed state, to prorate that operator's income. The pertinent Treasury Regulations have long provided the formulae for making that determination. ***

"The court below took the position that the individual taxpayer may ignore the first commercially marketable product of the industry if he finds it unprofitable to market it in that form. But compare the holding of the Fifth Circuit in *Alabama By-Products Corp.* v. *Patterson*, 258 F. 2d 892, certiorari denied, 358 U.S. 930."

[13] The court below characterized this as the "ordinary product" (316 F. 2d 931, 935); the Government in its petition in the *Cannelton* case, *supra*, characterized it as the "basic marketable product" (Pet. p. 15, note 21); and in the *Cannelton* case, *supra*, this Court referred to the point "where the ordinary miner shipped the product of his mine" (364 U.S. 76).

screened and dried salt, both rock and evaporated, in bulk form.)

Having concluded as a matter of fact that rock salt and evaporated salt are not commercially marketable within the meaning of the statute until after screening and drying and having further found as a matter of fact the substantial tonnages of salt that petitioner sells at that point, the court below could not, as a matter of law, properly conclude that the "proportionate profits" formula was the method of determining petitioner's gross income from mining. By reaching such conclusion, the court below ignored the language of the Regulations which sets forth the "proportionate profits" formula and reached a decision directly in conflict with the *Alabama By-Products* case, *supra*, and the two District Court cases previously referred to,[14] and the *United Salt* case in the Tax Court. In both *Alabama By-Products Corp.* v. *Patterson*, *supra*, (App. C, *infra*, pp. 113-128) and *Scott* v. *United States*, *supra*, (App. C, *infra*, pp. 151-153) the taxpayer asserted the right to use the "proportionate profits" formula, but in each case the court denied that right because the existence of a "representative market" had been established by the Government. In *Henderson Clay Products* v. *United States*, *supra*, (App. C, *infra*, pp. 131-149) the positions were reversed in that the Government, rather than the taxpayer, asserted the right to apply the "proportionate profits" formula where a "representative market" existed. But again, the court held that the formula could not be applied when a representative market existed. In the *United Salt* case, the "proportionate profits" formula was not even mentioned. (App. C, *infra*, pp. 155-178)

3. The decision of the court below is also in conflict with the decisions of this court in *United States* v. *Cannelton*

[14] See note 10, *supra*.

Sewer Pipe Company, 364 U.S. 76 (1960)(App. C, *infra*, pp. 93-108) and in *Riddell* v. *Monolith Portland Cement Co.*, 371 U.S. 537 (1963). (App. C, *infra*, pp. 109-111) In those cases, this Court held that the integrated mining operators (miners who extracted the depletable mineral and processed it into other products, i.e., fire clay and shale into sewer pipe and crushed limestone into cement) each must determine his depletion allowance based on his constructive income from the mineral product at the cutoff point where the ordinary miner shipped the product of his mine. In each of these cases, this Court found that there were substantial sales of the basic mineral, as listed in the percentage depletion statute, by ordinary miners of that mineral and that, therefore, the integrated mining operators of those respective minerals must compute their percentage depletion allowance as if they had sold their mineral at the same point as does the nonintegrated miner. Thus, this Court held that where there are integrated as well as nonintegrated miners of the same depletable mineral, the cutoff point is established by the ordinary miner in applying ordinary treatment processes to obtain the commercially marketable product or products.

To the extent that the decision of the court below, in sustaining the application of the "proportionate profits" formula with respect to evaporated salt, is predicated upon that fact that chemical companies extract large quantities of salt from the earth by means of the hydraulic mining method and utilize the resulting solution (brine) to manufacture chemical products such as chlorine and caustic soda, it is directly in conflict with the *Cannelton* case, *supra*. The decision of the court below would thus stand for the proposition that the integrated mining operator establishes the cutoff point for the nonintegrated miners of that particular mineral, exactly the opposite of the proposition

stated by this Court in the *Cannelton* case, *supra*, and reaffirmed in the *Monolith* case, *supra*. Futhermore, even the Treasury Department in a Revenue Ruling (Rev. Rul. 55-350, 1955-1 Cum. Bull. 290) has recognized the fact that the depletion cutoff point for integrated operators who mine salt to manufacture chemical products is determined by reference to the operations of the ordinary salt producers.[15]

4. The decision of the court below is also directly in conflict with the decision of the United States Court of Appeals for the Fourth Circuit in *Townsend* v. *Hitchcock Corporation*, 232 F. 2d 444 (CA-4; 1956) (App. C. *infra*, pp. 179-184) and the decision of the United States Court of Appeals for the Ninth Circuit in *New Idria Quicksilver Mining Co.* v. *Commissioner*, 144 F. 2d 918 (CA-9; 1944) (App. C, *infra*, pp. 185-191) where packaging and flasking were allowed because the products of the ordinary miners in the talc and mercury industries could not possibly be commercially marketed otherwise. The court below disallowed all processes after screening and drying but found as a matter of fact that, as a result of the segregation process of screening, various of the screen grades of salt

---

[15] Rev. Rul. 55-350 (1955-1 Cum. Bull. 290) reads, as follows: "The taxpayer mines salt from underground deposits by hydraulic methods. It is brought to the surface in the form of artificial brine and used in that form as raw material for the manufacture of chemical products which are the first products marketed by the taxpayer. For electrolytic manufacturing purposes, salt produced in brine has the same value as crude rock salt at the mouth of the mine. *Held*, in computing 'gross income from the property' for percentage depletion purposes, the market value of crude rock salt at the mouth of the mine should be ascertained either from direct sales of such material or by working back from sales of manufactured products. In order to arrive at the market value of crude rock salt by working back from sales of manufactured products, it is necessary to reduce the sales price by costs, expenses, and profits which are attributable to any processes subsequent to the completion of the mining processes. No opinion is expressed with respect to natural brine, this ruling being limited to natural salt deposits in solid form."

sold by the salt industry could not be sold in bulk because of the physical characteristics of those screen sizes, (App. B, *infra*, p. 68). Thus, the decision of the court below with respect to packaging as an ordinary treatment process in cases where the products must, as a physical matter, be contained in order to be commercially marketable is in direct conflict with the decisions of the *New Idria* and *Hitchcock* cases, *supra*.

CONCLUSION

In summary, the reasons for granting the writ may be stated as follows:

1. This case is as important to the uniform administration of the tax laws among competing ordinary miners, both in the salt industry and in the numerous other industries where the miners sell the depletable mineral without physical or chemical change but after applying an "unallowable" process to a portion of their production, as was the *Cannelton* case with respect to integrated mining operators. By approving the erroneous application of the "proportionate profits" formula, the decision of the court below has judicially sanctioned discriminatory tax treatment of competing salt miners, a clear violation of one of the precepts of this Court's *Cannelton* decision.

2. The decision of the court below, in approving the application of the "proportionate profits" formula after having determined the "ordinary product" to be one sold in substantial tonnages by the salt industry, including the petitioner, is in direct conflict (a) with a decision of the Court of Appeals for the Fifth Circuit and with the decisions of two District Courts in that Circuit interpreting the Treasury Regulations which set out the "proportionate profits" formula and (b) with the Government's interpretation of those Regulations, and conflicts, in principal, with the

Cannelton and *Monolith* decisions of this Court and with the decision of the Tax Court involving the salt industry.

3. The decision of the court below is in direct conflict with the *Cannelton* and *Monolith* decisions of this Court to the extent that it is predicated on the proposition that the depletion cutoff point for a particular mining industry is established by the integrated mining operators rather than by the ordinary miners.

4. The decision of the court below is in direct conflict with a decision of the Court of Appeals for the Fourth Circuit and with a decision of the Court of Appeals for the Ninth Circuit in failing to hold packaging to be an "allowable" process in the cases where the products must, as a physical matter, be contained in order to be "commercially marketable."

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

LLOYD M. MCBRIDE,
ROBERT B. GERRIE,

Counsel for Petitioner

October, 1963